Loh Pit Im (suing as executor of the estate of Cheang Khai Beng @ Cheang Peng Hooi, deceased) & Anor v Mary Ong Guat Poh (sued as executor of the estate of Joseph Peh Soon Keat, deceased)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–748 OF 2008
ZALEHA ZAHARI (NOW FCJ), MOHD HISHAMUDIN AND LINTON ALBERT JJCA
10 SEPTEMBER 2014

Contract — Breach — Fraud — Sale of land — Payment of deposit — Demand for balance of purchase price to him — Whether transfer and registration of property null and void and ought to be set aside — National Land Code s 340 — Whether solicitor in breach by 'unilaterally and fraudulently' transferring property — Whether purchaser a bona fide purchaser — Whether termination of sale and purchase agreement and subsequent transfer of property was fraudulent breach of contract

The plaintiff ('the respondent') was the widow of the deceased ('Joseph') who purchased the land which was the subject matter of this case. Upon Joseph's death, the plaintiff was appointed as the administrator of Joseph's estate. The first defendant in the High Court ('Cheang'), the vendor of the land in issue, died after hearing of the case concluded before the High Court judge and the case at submissions stage. Cheang's widow ('the first appellant') was then substituted as a party to the proceedings. More than five years after the signing of the SPA between Cheang and Joseph, the land was tranferred and registered in the name of Cheang Khai Beng Sdn Bhd a company of which Cheang and the first appellant were shareholders and directors. Cheang Khai Beng Sdn Bhd was named as the second defendant ('the second appellant'). At the material time, Cheang was the owner of 1/8 undivided share of land ('the said property'). By a sale and purchase agreement ('the SPA'), Cheang sold the said property to Joseph at a purchase price of RM125,000. On the date the SPA was executed, the said property was 'controlled premises' pursuant to s 4 of the Control of Rent Act 1966 ('the Act') and there were existing tenants occupying the said property. The solicitor who prepared the SPA ('Chooi') stated he was only acting for the purchaser (Joseph) and not the vendor (Cheang). Upon execution of the SPA Joseph paid Cheang 10% of the purchase price amounting to RM12,500 as deposit. Clause 4 provides that the date for payment of the balance purchase price of RM112,500 was three months from the date of the SPA. Before the completion date, Joseph had issued a bank draft

for the balance purchase price of RM112,500 to Chooi as stakeholder. This balance sum was not released to Cheang by reason of Joseph's express instructions to Chooi. Joseph died about two years after signing the SPA. When Joseph died the balance purchase price had yet to be released by the respondent's solicitors to Cheang as it was still held by the Joseph's solicitors as stakeholder. The said property had yet to be de-controlled. For a period of almost three years after Joseph's death, the respondent did not take any step to inform Chooi to address all correspondence and to take instructions in respect of the said property only from her, not from her son, Jimmy. In 1997 there was also a change in the law in respect of 'controlled' premises. The Control of Rent (Repeal) Act 1997 ('the Repealing Act'), came into force on 1 September 1997. The Control of Rent Act 1966 was repealed by the Repealing Act. Chooi advised the beneficiaries of Joseph's estate that after 1 September 1997, the said property was no longer 'controlled' premises. Cheang took the position that the said property was automatically de-controlled upon the date of the coming into force of the Repealing Act and demanded payment of the balance purchase price to him, failing which the SPA would be terminated and deposit forfeited. Cheang had then refunded the deposit sum of RM12,500 to Chooi and transferred the said property to the second appellant. A year later, the respondent filed a Writ of Summons at the High Court and applied for: a declaration that the transfer and registration of the said property to the second defendant was null and void and be set aside under s 340 of the National Land Code; a declaration that the respondent had a legal and equitable interest in the property; specific performance that the second appellant to transfer the property to the plaintiff or her successors in-title, nominee or assign; that the first and second defendants pay damages to the respondent. The respondent alleged that Cheang was in breach of the SPA by 'unilaterally and fraudulently' transferring the said property to the second appellant; the second appellant was not a bona fide purchaser of the said property. The High Court held that the first appellant's termination of the SPA and subsequent transfer of the said property was a fraudulent breach of contract. Hence, the present appeal.

Held, allowing the appeal:

(1) The said property clearly was sold with existing tenancies. Clause 3(c) of the SPA confirmed that. To obtain a de-controlled certificate to complete the transaction required not only Cheang but also Joseph, as well as the tenants to take action. Joseph had entered into a written tenancy agreement with one Tan Chin Huat granting him a tenancy of three years for the front portion of the ground floor of the said property. Such a conduct clearly had jeopardised the right for Cheang to apply for the said property to be de-controlled. Section 24 of the Act does not apply when there are monthly tenants (see para 46).

(2) The respondent had authorised her son, Jimmy, to act and give instructions to their own solicitors, in view of the respondent's admission

that Jimmy had acted with her authority, to give instructions to solicitors on her behalf. The trial judge clearly erred in finding that the respondent did not authorise Jimmy to instruct Chooi to terminate the SPA. Jimmy testified that although he had spoken to Chooi on the telephone on prior occasions he denied speaking to Chooi to ask Cheang to terminate the SPA and for the refund of the RM12,500 (see para 51).

(3) Condition 3(e) of the SPA was no longer capable of performance with the coming into force of the Repealing Act. The SPA had been terminated. That Joseph initially was not right in insisting on a compliance with a condition which was not capable of performance. Cognisance must necessarily be taken of the fact that, despite Joseph having paid the balance purchase price to his solicitors as stakeholder within the three months specified in the SPA, that sum had never been released to Cheang by Joseph's solicitors. With the coming into force of the Repealing Act and condition 3(e) no longer capable of performance, Cheang had every right to demand release of the balance purchase price to him. When the balance sum was not released to Cheang within the period given, Cheang was entitled and had the right to elect, and had in fact elected, to treat the contract at an end. The respondent's unwillingness to authorise her solicitors to release the balance sum to Cheang, contrary to the advise given to her by her own solicitors, clearly disentitled her to specific performance of the SPA (see para 53).

(4) The respondent had clearly not proved fraud beyond reasonable doubt. There clearly was no intention to defraud Joseph's beneficiaries of the said property. When Cheang transferred the property to the second appellant, Cheang had not received the balance purchase price. He had given the respondent due notice to effect payment within the prescribed period after the Repealing Act came into force. Upon termination of the SPA upon instructions by Jimmy, Cheang was persuaded not to forfeit the deposit. The deposit sum had been duly paid by Cheang to the respondent's lawyers. There was then silence since June 1998. It was only on February 2001 that the respondent claimed to have no knowledge as to what transpired, holding herself out as the only person authorised to give instructions to the lawyers. If indeed this was the position, the respondent was clearly then guilty of delay and laches. Bearing in mind the fact that Cheang only received 10% of the purchase price which was refunded, the trial judge certainly erred in directing specific performance of the SPA and awarding the respondent damages (see para 54).

(5) The trial judge had not critically analysed the evidence and tested them against the probabilities of the case. The trial judge had failed to judicially appreciate the evidence and made wrong inferences from the proven facts. She erred in taking into account irrelevant considerations and in failing to give due weight to relevant considerations. Chooi had no reason

to lie about his own mistake. Clause 3(e) clearly contradicted and was inconsistent with clause 3(c). The said property could not clearly in such a situation be decontrolled. Chooi's failure to communicate this mistake to the parties should not have been held against the appellants (see paras 50 & 55).

[Bahasa Malaysia summary

Plaintif ('responden') merupakan balu si mati ('Joseph') yang telah membeli tanah yang menjadi hal perkara dalam kes ini. Setelah Joseph meninggal dunia, plaintif dilantik sebagai pentadbir hartanah Joseph. Defendan pertama di Mahkamah Tinggi ('Cheang'), penjual tanah yang dipertikaikan, telah meninggal dunia selepas penutupan perbicaraan kes di hadapan hakim Mahkamah Tinggi dan di peringkat penghujahan kes. Balu Cheang ('perayu pertama') digantikan sebagai pihak dalam prosiding. Lebih lima tahun selepas meterai PJB antara Cheang dan Joseph, tanah tersebut dipindah milik dan didaftarkan di bawah nama Cheang Khai Beng Sdn Bhd, sebuah syarikat di mana Cheang dan perayu pertama merupakan pemegang syer dan pengarah. Cheang Khai Beng Sdn Bhd dinamakan sebagai defendan kedua ('perayu kedua'). Pada masa material, Cheang merupakan pemilik 1/8 bahagian yang tidak berbahagi ('hartanah tersebut'). Melalui perjanjian jual beli ('PJB'), Cheang menjual hartanah tersebut kepada Joseph pada harga belian RM125,000. Pada tarikh PJG dimeterai, hartanah tersebut merupakan 'premis terkawal' berikutan s 4 Akta Kawalan Sewa 199 ('Akta') dan terdapat penyewa-penyewa yang menghuni hartanah tersebut. Peguamcara yang menyediakan PJB tersebut ('Chooi') menyatakan bahawa dia hanya bertindak bagi pihak pembeli (Joseph) dan bukan penjual (Cheang). Selepas memeterai PJB tersebut, Joseph membayar 10% daripada harga belian kepada Cheang yang mana terjumlah kepada RM12,500 sebagai deposit. Klausa 4 memperuntukkan bahawa tarikh pembayaran baki harga belian berjumlah RM112,500 adalah tiga bulan dari tarikh PJB. Sebelum tarikh penyempurnaan, Joseph telah mengeluarkan draf bank bagi baki harga belian sebanyak RM112,500 kepada Chooi sebagai pemegang amanah. Jumlah baki ini tidak dilepaskan kepada Cheang akibat arahan nyata Joseph kepada Chooi. Joseph meninggal dunia dua tahun selepas menandatangani PJB tersebut. Apabila Joseph meninggal dunia, baki harga belian belum dilepaskan oleh peguamcara responden kepada Cheang kerana ia masih dipegang oleh peguamcara Joseph sebagai pemegang amanah. Hartanah tersebut belum bebas daripada kawalan. Bagi tempoh tiga tahun selepas kematian Joseph, responden tidak mengambil apa-apa langkah untuk memaklumkan Chooi untuk menangani kesemua surat-menyurat dan mengambil arahan bagi hartanah tersebut hanya daripadanya dan bukan anak lelakinya, Jimmy. Pada tahun 1997, terdapat pertukaran dalam undang-undang berkenaan premis terkawal. Akta Kawalan Sewa (Pemansuhan) 1997 ('Akta Pemansuhan') mula berkuat kuasa pada 1 September 1997. Akta Kawalan Sewa 1966 dimansuhkan oleh Akta Pemansuhan. Chooi menasihatkan benefisiari-benefisiari hartanah

Joseph bahawa selepas 1 September 1997, hartanah tersebut bukan lagi hartanah terkawal. Cheang mengambil kedudukan bahawa hartanah tersebut telah secara automatik bebas daripada kawalan dengan berkuatkuasanya Akta Pemansuhan dan menuntut pembayaran baki harga belian diberikan kepadanya, yang mana jika gagal PJB akan ditamatkan dan deposit akan dilucuthak. Cheang kemudiannya memulangkan jumlah deposit sebanyak RM12,500 kepada Chooi dan memulangkan hartanah tersebut kepada perayu kedua. Setahun kemudian, responden memfailkan writ saman ke Mahkamah Tinggi dan memohon satu pengisytiharan bahawa pindah milik dan pendaftaran hartanah tersebut kepada defendan kedua adalah tidak sah dan batal dan diketepikan di bawah s 340 Kanun Tanah Negara; satu pengisytiharan bahawa responden mempunyai kepentingan perundangan dan ekuiti dalam hartanah; pelaksanaan spesifik agar perayu kedua memindah milik hartanah tersebut kepada plaintif atau pengganti hakmilik, penama atau penerima serah hak; agar defendan pertama dan kedua membayar ganti rugi kepada responden. Responden mendakwa bahawa Cheang melanggar PJB dengan secara unilateral dan penipuan memindah milik hartanah tersebut kepada perayu kedua; perayu kedua bukan pembeli bona fide hartanah tersebut. Mahkamah Tinggi memutuskan bahawa penamatan PJB oleh perayu pertama dan pindah milik seterusnya hartanah tersebut adalah pemecahan kontrak secara penipuan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Hartanah tersebut jelas telah dijual dengan sewaan-sewaan sedia ada. Klausa 3(c) PJB mengesahkannya. Untuk mendapatkan sijil bebas kawalan bagi memenuhi transaksi memerlukan bukan sahaja Cheang tetapi juga Joseph, serta penyewa-penyewa lain untuk mengambil tindakan. Joseph telah memasuki perjanjian sewaan bertulis dengan Tan Chin Huat yang membenarkan sewaan selama tiga tahun bagi bahagian hadapan tingkat bawah hartanah tersebut. Tindakan sedemikian jelas menjejaskan hak Cheang untuk memohon agar hartanah tersebut dibebaskan daripada kawalan. Seksyen 24 Akta tidak terpakai apabila terdapat penyewa bulanan (lihat perenggan 46).

(2) Responden telah memberikan kuasa kepada anak lelakinya, Jimmy, untuk bertindak dan memberi arahan kepada peguamcaranya, melihat pada pengakuan responden bahawa Jimmy telah bertindak dengan kuasa responden untuk memberi arahan kepada peguamcara bagi pihaknya. Hakim bicara jelas terkhilaf dalam memutuskan bahawa responden tidak memberikan kuasa kepada Jimmy untuk memberi arahan kepada Chooi untuk menamatkan kontrak. Jimmy memberi keterangan bahawa walaupun dia telah berbincang dengan Chooi dalam telefon dalam masa-masa terdahulu di mana dia menafikan ada bercakap dengan Chooi untuk meminta Cheang menamatkan PJB dan meminta pemulangan RM12,500 (lihat perenggan 51).

(3) Syarat-syarat 3(e) PJB tidak lagi boleh dilaksanakan dengan kuatkuasanya Akta Pemansuhan. PJB telah ditamatkan. Joseph, dari awal lagi, salah dalam menggesa pematuhan terhadap syarat yang tidak boleh dilaksanakan. Perhatian mestilah diberikan kepada fakta bahawa, walaupun Joseph telah membayar baki harga belian kepada peguamcaranya sebagai pemegang amanah dalam masa tiga bulan yang dinyatakan dalam PJB, jumlah tersebut tidak diserahkan kepada Cheang oleh peguamcara Joseph. Dengan kuatkuasanya Akta Pemansuhan dan syarat 3(e) tidak boleh dilaksanakan lagi, Cheang mempunyai hak untuk menyerahkan baki harga belian kepadanya. Apabila baki belian tidak diserahkan kepada Cheang dalam tempoh yang diberikan, Cheang berhak untuk memilih, malahan telah memilih, untuk menganggap kontrak berada di penghujungnya. Ketidaksudian responden untuk memberikan hak kepada peguamcaranya untuk menyerahkan jumlah baki kepada Cheang, berbeza dengan nasihat yang diberikan oleh peguamcaranya, jelas melucutkan haknya ke atas pelaksanaan spesifik PJB (lihat perenggan 53).

(4) Responden dengan jelas tidak berjaya membuktikan penipuan melampau keraguan munasabah. Jelas tiada niat untuk menipu benefisiari Joseph mengenai hartanah tersebut. Apabila Cheang memindah milik hartanah tersebut kepada perayu kedua, Cheang tidak menerima baki harga belian. Dia telah memberikan notis wajar kepada responden untuk membayar dalam tempoh masa selepas Akta Pemansuhan berkuatkuasa. Dengan penamatan PJB, melalui arahan oleh Jimmy, Cheang terpengaruh untuk tidak melucuthak deposit tersebut. Jumlah deposit telah dibayar oleh Cheang kepada peguam-peguam responden. Mereka diam hingga Jun 1998. Hanya pada Februari 2001 barulah responden mendakwa mempunyai pengetahuan mengenai apa yang berlaku, menyatakan dirinya sebagai satu-satunya orang yang berkuasa untuk memberi arahan kepada peguam-peguam. Mengambil kira bahawa Cheang hanya menerima 10% daripada harga belian yang mana telah dipulangkan, hakim bicara jelas khilaf dalam mengarahkan pelaksanaan spesifik PJB dan mengawardkan ganti rugi kepada responden (lihat perenggan 54).

(5) Hakim bicara tidak menganalisa keterangan secara kritikal dan menguji kesemuanya terhadap kemungkinan kes. Hakim bicara gagal untuk mempertimbangkan keterangan secara kehakiman dan membuat inferens yang salah daripada fakta-fakta yang terbukti. Beliau terkhilaf dalam mengambil kira pertimbangan-pertimbangan yang tidak relevan dan dalam kegagalan memberi keberatan wajar kepada pertimbangan-pertimbangan yang relevan. Chooi tidak mempunyai alasan untuk menipu mengenai kesalahannya sendiri. Klausa 3(e) jelas bercanggah dan tidak selaras dengan klausa 3(c). Hartanah tersebut tidak boleh, dalam keadaan tersebut, dibebaskan daripada kawalan. Kegagalan

Chooi untuk memaklumkan kesalahan ini kepada pihak-pihak tidak sepatutnya digunakan terhadap perayu-perayu (lihat perenggan 50 & 55).]]]]]

Notes

For cases on breach in general, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3097–3487.

Cases referred to

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal for Ulu Kinta & Ors [1972] 1 MLJ 70, FC (refd)
Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323, CA (refd)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420; [2006] 4 CLJ 267, CA (refd)

Legislation referred to

Control of Rent Act 1966 ss 4, 24, 24(1)(a), (b)
Control of Rent (Repeal) Act 1997 ss 5, 10,
National Land Code s 340, 340(2)(a)

Appeal from: Suit No 22–48 of 2001 (High Court, Pulau Pinang)

M Thayalan (Cynthia Lee Bee Gaik with him) (Ban Eng, Anyual & Foong) for the appellant.
Rabin Devadason (Devadason & Devadason) for the respondent.

Zaleha Zahari JCA:

[1] This appeal was unanimously allowed with costs on 27 July 2012. I have read the judgment of my brother Linton Albert JCA in draft. I would like to add my reasons as to why this appeal was allowed.

THE PARTIES

[2] The parties in this appeal were not the original parties to the land transaction in issue.

[3] Mary Ong Guat Poh (plaintiff in the High Court/ respondent in this appeal) is the widow of Joseph Peh Soon Keat (subsequently referred to as 'Joseph') who purchased the land which is the subject matter of this case. Upon Joseph's death on 11 July 1995 the plaintiff was appointed as administrator of Joseph's estate on 25 August 1997.

[4] Cheang Khai Beng @ Cheang Peng Hooi (deceased), the first defendant in the High Court (subsequently referred as 'Cheang'), the vendor of the land in issue, died after hearing of the case concluded before the High Court judge and the case at submissions stage. Cheang's widow (the first appellant in this appeal) was then substituted as a party to the proceedings.

[5] On 9 July 1998 (ie more than five years after the signing of the SPA between Cheang and Joseph) the land in issue was tranferred and registered in the name of Cheang Khai Beng Sdn Bhd a company of which Cheang and his wife (the first appellant) were shareholders and directors. Cheang Khai Beng Sdn Bhd was named as the second defendant (the second appellant in this appeal).

BACKGROUND

[6] The background facts are these. Cheang at the material time was the owner of 1/8 undivided share of land known as No Lot 1014, Seksyen 16, Bandar Georgetown, Daerah Timur Laut, Penang on which was erected premises known as No 24, Lorong Selamat, Penang ('the said property').

[7] By sale and purchase agreement dated 5 May 1993 ('the SPA') Cheang sold the said property to Joseph at a purchase price of RM125,000. It is common ground that on the date the SPA was executed the said property was 'controlled premises' pursuant to s 4 of the Control of Rent Act 1966 ('the Act'). It is also not in issue that when the SPA was executed there were existing tenants occupying the said property.

[8] The solicitor who prepared the SPA to this transaction was Mr Chooi Chooi See Mun (SD2) (subsequently referred to as 'Chooi') of Messrs Wong-Chooi & Mohd Nor. The fact that Messrs Wong-Chooi & Mohd Nor was retained to act for the purchaser (Joseph) was not in issue. Whether Messrs Wong-Chooi & Mohd Nor was also acting for the vendor (Cheang) was however a disputed fact. Chooi had in his testimony testified that he was only acting for the purchaser (Joseph) and not the vendor (Cheang).

[9] Upon execution of the SPA Joseph paid Cheang 10% of the purchase price amounting to RM12,500 as deposit. Clause 4 provides that the date for payment of the balance purchase price of RM112,500 was three months from the date of the SPA (ie 5 August 1993).

[10] Clause 3 of the SPA of the SPA provides as follows:

> 3. The sale and purchase of the said property is subject to the following terms and conditions :-

(a) the Vendor deducing a good, registrable and marketable title to the said property.

(b) the said property being free from all encumbrances.

(c) with existing tenancies.

(d) any defect in the title to the said property shall be perfected by the Vendor at its own costs and expensed.

(e) the said house being de-controlled.

[11] As one of the conditions of the sale was subject to the said property being '*de-controlled*'. the provision relating to cessation of controlled premises as set out in s 24 of the Act is reproduced for ease of reference. It provides as follows:

24. Cessation of controlled premises.

(1) In either of the following events, namely-

(a) where the tenancy of any controlled premises, being a tenancy for a fixed period and other than a monthly tenancy, has been determined either by effluxion of time or by any other means whatsoever; or

(b) where the tenant of any controlled premises for any reason whatsoever surrenders his tenancy either on his own volition or is required by law so to do,

the landlord thereof may apply to the Tribunal requiring the latter to issue a certificate stating either or both of the facts referred to in this subsection, and upon the issue of such certificate a copy thereof shall be served on the tenant.

(2) Upon the service on the tenant of a copy of such certificate, the premises concerned shall forthwith cease to be controlled premises and any person holding on after such cessation shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under this Act but for such cessation.

[12] It is common ground that before the completion date (ie 5 August 1993), vide letter dated 22 July 1993, Joseph had issued a bank draft for the balance purchase price of RM112,500 to his solicitors, Messrs Wong-Chooi & Mohd Nor, as stakeholder. It is also common ground that this balance sum was not released to the vendor Cheang by reason of Joseph's express instructions to his solicitors that this balance sum was to be released to the vendor only upon compliance of:

...all the terms and conditions stipulated therein, with particular reference to Clause 3, sub-clauses (1) to (e), are duly adhered to before releasing the said sum of RM 112,500/-to the Vendor.

[13] Joseph died on 11 July 1995, about two years after signing the SPA. When Joseph died the balance purchase price had yet to be released by the respondent's solicitors to Cheang. It was still held by the Joseph's solicitors as stakeholder for the reason that condition 3(e) had still not been satisfied. The said property had yet to be de-controlled.

[14] Joseph left the following beneficiaries, Mary Ong Guat Poh, (his widow, the plaintiff in the High Court/respondent in this appeal), a son (Jimmy Peh Hock Jin subsequently referred as 'Jimmy') as well as two others. Correspondence after Joseph's death during the period 16 October 1995 to 17 September 1997 exchanged between Messrs Wong-Chooi & Mohd Nor and the beneficiaries of Joseph's estate in respect of the said property were produced at trial. Messrs Wong-Chooi & Mohd Nor letters were addressed to '*Jimmy Peh Hock Jin & 4 others*'. The fact that Joseph's widow, (the respondent) was one of the '*4 others*' referred to in these letters was an admitted fact. For a period of almost three years after Joseph's death the respondent did not take any step to inform her solicitors Messrs Wong-Chooi & Mohd Nor to address all correspondence and to take instructions in respect of the said property only from her, not from her son, Jimmy.

[15] In 1997 there was also a change in the law in respect of 'controlled' premises. The Control of Rent (Repeal) Act 1997 ('the Repealing Act'), came into force on 1 Spetember 1997. The Control of Rent Act 1966 was repealed by the Repealing Act. The material provisions of the Repealing Act pertinent to the issues in this appeal are reproduced for ease of reference.

> 2. The Control of Rent Act 1966, which in this Act is referred to as 'the Act'. is repealed.
>
> 3 Upon the repeal of the Act under section 2, any tenancy between a landlord and a tenant before the date of the repeal shall forthwith be deemed to have ceased.
>
> ...
>
> ...
>
> 5(1) Subject to subsection (2), 'transitional period' means the period commencing on 1 September 1997 and ending on 31 December 1999.
>
> (2) ...
>
> 6(1) Notwithstanding section 3, any tenant, sub-tenant or joint-tenant who-
>
> (a) was in actual occupation of the premises on the date of the repeal of the Act; and
>
> (b) could have lawfully continued to occupy the premises but for the repeal of the Act,
>
> shall be deemed to have entered into a tenancy with the landlord as from the date of the repeal of the Act.

(2) Unless sooner terminated by mutual consent of the parties, a tenancy deemed to have been entered into under subsection (1) shall be in force until the expiry of the transitional period.

7. The amount of rental to be paid monthly by the tenant to the landlord shall be determined in accordance with the formula in the Schedule.

[16] The evidence shows that there was a difference of opinion whether all controlled premises were automatically de-controlled by the Repealing Act. Messrs Wong-Chooi & Mohd Nor advised the beneficiaries of Joseph's estate that after 1 September 1997, the said property was no longer '*controlled*' premises. That the said property was automatically decontrolled with effect from 1 September 1997 and that cl 3(e) of the SPA had been satisfied.

[17] Joseph's beneficiaries however did not accept the advise given by their solicitors Messrs Wong-Chooi & Mohd Nor. They took the position that the said property was not de-controlled despite the coming into force of the Repealing Act. In such a situation Messrs Wong-Chooi & Mohd Nor was of course not authorised to release the balance purchase price held by them as stakeholder to Cheang.

[18] The vendor Cheang took the position that the said property was automatically de-controlled upon the date of the coming into force of the Repealing Act (ie 1 September 1997). Cheang had, through his solicitors, Messrs Tan Beng Chuan & Co, vide letter dated 3 December 1997 to Messrs Wong-Chooi & Mohd Nor (who was then still holding the balance purchase price as stakeholder), demanded payment of the balance purchase price to him before 15 December 1997, failing which the SPA would be terminated and deposit forfeited. This letter states as follows:

We are instructed to give your client, the Purchaser, notice, through you, which we hereby do, to pay the balance purchase price on or before the 15th day of December, 1997 failing which our client will terminate the above agreement and forfeit the said deposit.

[19] Messrs Wong-Chooi & Mohd Nor had forwarded a copy of Messrs Tan Beng Chuan & Co letter dated 3 December 1997 to '*Jimmy Peh Hock Jin & 4 others*' for instructions. There was no response to this letter from '*Jimmy Peh Hock Jin & 4 others*'.

[20] There is also in evidence a letter dated on 26 June 1998 from Messrs Wong-Chooi & Mohd Nor also to '*Jimmy Peh Hock Jin & 4 others*' in the following terms:

> We refer to the telephone conversation and as instructed we are pleased to inform you that we have managed to persuade the Vendor to call off the deal and refund the deposit of RM12,500.
>
> Please let us have a copy of the Letters of Administration of your late father, Joseph Peh Soon Keat so that we can send you the full purchase price of RM125,000 plus interest on the balance purchase price of RM112,500.

[21] Cheang had then refunded the deposit sum of RM12,500 to Messrs Wong-Chooi & Mohd Nor. On 9 July 1998, Cheang transferred the said property to Cheng Khai Beng Sdn Bhd (the second appellant).

[22] Not having had a response to his letter dated 26 Juen 1998, Messrs Wong-Chooi & Mohd Nor issued a reminder letter dated 29 September 1998 to '*Jimmy Peh Hock Jin and 4 others*'. There was no response to this letter from '*Jimmy Peh Hock Jin and 4 others*'. Messrs Wong-Chooi & Mohd Nor only heard from Jimmy Peh & 4 others' two years later upon receipt of letters dated 10 January 2000, 28 January 2000 and 22 February 2000 from them enquiring as the status of the matter.

[23] A year later on 2 February 2001, Joseph's widow (the respondent) in her capacity as administrator of Joseph's Estate, filed a writ of summons at the Penang High Court naming Cheang as first defendant and Cheng Khai Beng Sdn Bhd as second defendant. The respondent applied for the following reliefs:

(a) a declaration that the transfer and registration of the said property to the second defendant is null and void and be set aside under s 340 of the National Land Code;

(b) a declaration that the plaintiff, as the administrator of the estate of Joseph Peh Soon Keat (the purchaser) has a legal and equitable interest in the property;

(c) specific performance that the second defendant to transfer the property to the plaintiff or her successors-in-title, nominee or assign;

(d) that the first and second defendants pay damages to the plaintiff.

[24] The respondent alleged that Cheang was in breach of the SPA by 'unilaterally and fraudulently' transferring the said property to the second appellant. The respondent further alleged that the second appellant was not a bona fide purchaser of the said property by reason of Cheang being a shareholder and director of the second appellant.

[25] The appellants denied the respondent's claim. The appellants' case was that the SPA had been validly terminated by the respondent's solicitors, Messrs Wong-Chooi & Mohd. Nor, upon instructions given by '*Jimmy*' who was

acting on the respondent's behalf. The appellants claimed that the insertion of cl 3 (e) in the SPA (for the said property to be de-controlled), was a mistake of which the purchaser was aware of, as, before signing the SPA, Joseph had entered into a tenancy agreement with one of the tenants arising from which the said property could, not be de-controlled.

THE HIGH COURT JUDGE'S DECISION

[26] The High Court judge after a full trial allowed the respondent's claim on the following grounds:

> ... it was the first defendant's duty to apply for the property to be de-controlled. As the first defendant did not apply for the said property to be decontrolled, the first defendant had breached the express term concerning the decontrol of property and CSM could not release the balance of the Purchase Price to the first defendant because the said property had yet to be de-controlled.

[27] Based on the evidence before her the trial judge findings were that the plaintiff did not authorise her son Jimmy Peh (PW2), to terminate the SPA. The trial judge accepted the respondent's evidence, not that of Cheang nor the respondent's solicitors, Chooi. She held that the first appellant's termination of the SPA and subsequent transfer of the said property was a fraudulent breach of contract. Fraud, according to the trial judge, had been proved beyond reasonable doubt.

THE APPELLANTS' COUNSEL'S SUBMISSIONS

[28] The appellants' counsel highlighted the following facts. At the time the parties were contracting, there could not have been specific performance of the SPA. Several of the existing tenancies were monthly tenancies. As a result of the existing tenancies the said property could not be decontrolled. The written tenancy agreement signed by Joseph compounded the problem for the said property to be de-controlled.

[29] The appellants' counsel submitted that the trial judge erred in ruling that there was no mistake in the inclusion of condition cl 3(e). The respondent's solicitors Chooi had in his testimony testified that the insertion of cl 3(e) was a mistake by reason of cl 3(e) being inconsistent with the other clauses of the SPA. It was also not consistent with Joseph's conduct as Joseph had himself entered into an agreement with one of the tenants on the same date as signing of the SPA. The judge accordingly erred in holding Chooi's failure in pointing out this mistake to the parties against Cheang.

[30] He highlighted the fact that after Joseph's death Messrs Wong-Chooi & Mohd Nor's had addressed their letters in respect of the said property to '*Jimmy*

Peh & 4 others'. The learned judge clearly failed to appreciate the fact that the respondent was one of the '*4 others*'. Clearly, her solicitors was communicating with her as one of the '*4 others*'. The respondent held out to her solicitors that she had given her son, Jimmy, full authority to give instructions to correspond and liaise with the solicitors in respect of the said property.

[31] The appellants' counsel submitted was what exactly the respondent authorised her Jimmy to do was a matter between them both. As far as the solicitors acting on behalf of the respondent was concerned, the respondent had allowed and authorized Jimmy to represent Joseph's estate and was fully aware of what Jimmy wrote, said and did.

[32] The appellants' counsel submitted that with the repeal of the Control of Rent Act 1996 with effect from 1 September 1997 by the Repealing Act, there was no longer any '*controlled premises*'. Effective 1 September 1997 the Rent Tribunal ceased to exist. There was established a 'De-control Tribunal' under s 10 which only had jurisdiction to hear disputes on rentals and recovery of vacant possession. The property was automatically de-controlled. Accordingly, with effect from 1 September 1997, cl 3(e) of the SPA had been complied with and the balance purchase price was due and payable to Cheang.

[33] Cheang's had through his solicitors, Messrs Tan Beng Chuan & Co by letter dated 3 December 1997 to the respondent's solicitors, demanded payment of the balance purchase price by 15 December 1997. Despite advise given by their own solicitors, the respondent, through Jimmy whom she held out as authorised to act for Joseph's estate, refused to authorise her solicitors to release the balance purchase price to Cheang. It is common ground that the balance purchase price was not released by the respondent's solicitors to Cheang within the stipulated time frame stated in this letter of demand. The respondent was clearly in breach of the SPA by not authorising her solicitors to release the balance purchase price to Cheang. In this situation it was open for Cheang to consider the transaction closed and for him to forfeit the deposit. There was no necessity for Messrs Tan Beng Chuan & Co to send another letter to confirm a termination of the SPA.

[34] There were then evidence of negotiations relating to the forfeiture of the deposit upon termination of the SPA culminating in Messrs Wong-Chooi & Mohd Nor issuing the letter dated 26 June 1998 informing Joseph's beneficiaries that Cheang had been persuaded to call of the deal and to return the deposit. Messrs Wong-Chooi & Mohd Nor did more than was necessary to confirm the instructions to terminate the SPA. Once the instructions to terminate the SPA was given (and the judge finding was that Jimmy did in fact gave such an instruction), the reason for termination was irrelevant.

[35] Cheang had then refunded the 10% deposit. As far as Cheang was concerned, the SPA had come to an end and it was open to him to transfer the said property to a company, the second appellant, which was owned by him and his wife (the first appellant). The transfer of the said property from Cheang to the second appellant was registered on 9 July 1998. The contemporaneous documents supports the appellants' contentions.

[36] In arriving at the decision which she did the learned trial judge clearly failed to take into consideration the fact that the balance purchase price was never released to Cheang by the respondent's solicitors and that Cheang had refunded the deposit to the said solicitors.

[37] In a suit for specific performance, a purchaser was required to prove that he had performed or had been at all times been ready and willing to perform his part of the contract or his part of the obligations (see *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290). In the circumstances of this case Joseph was clearly wrong in insisting on de-control of the said property when it was not possible to do so in 1993 because of existing tenancies; and again, impossible to do so in 1997 because there was no longer any statutory provision for de-control.

[38] He further submitted that the respondent's claim for specific performance in 2001 was clearly defeated by undue delay and laches and that it was not just and equitable to order specific performance. The totality of the evidence shows that SPA had been terminated way back in 1998. Cheang had accepted, the termination and refunded the deposit. Having terminated the SPA in 1998, it was no longer open for the respondent, as administrator of the Joseph's estate in 2001, to ask for specific performance of the SPA (see *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323).

[39] Specific performance will be refused if the effect is to cause unfairness or undue hardship (see *Tan Chin Swee*). The appellants would certainly suffer hardship if specific performance was to be ordered. From 1993 until 2000 Cheang only received 10% of the purchase price, which sum was refunded in 1998 based on the respondent's termination of the SPA.

[40] The appellants pray that the order of the High Court dated 25 October 2007 be set aside and the appeal be allowed with costs here and below.

THE RESPONDENT'S SUBMISSIONS

[41] The balance of the purchase price of RM112,500 was paid to the solicitors as stakeholders within the three months specified in the SPA. De-controlling of the said property was of the essence to the SPA which

Cheang had failed to do. Parties accepted the existence of tenants and the said property had to be de-controlled. The alleged mistake, the inclusion of cl 3(e), according to the respondent's counsel was an afterthought to defeat the respondent's claim. Cheang had failed to take any measures to terminate the tenancies and to decontrol the said property prior to 1 January 2000.

[42] The respondent's counsel submitted that the premises only became automatically de-controlled on 1 January 2000. It was only on 1 January 2000 that Cheang became entitled to the balance purchase price. The respondent was not accordingly guilty of laches. Section 5 of the Repealing Act states '*Subject to sub-section 2 'transitional period' means the period commencing 1 September 1997 and ending on 3 December 1999*'.

[43] Prior to 1 January 2000 Cheang had fraudulently transferred the said property to his own company, the second appellant. The learned trial judge was right in finding that the respondent had proved fraud beyond reasonable doubt. Under s 340(2)(a) of the National Land Code a registered title is defeasible in the case of fraud where its proprietor was a 'party or privy' to the fraud.

[44] The court was urged to dismiss the appeal with costs.

DECISION

[45] The determination of this case clearly was not dependent solely on an assessment of the credibility of witnesses. The events from 1993 until 2000 were fully documented, by the SPA in the first place as well as by contemporaneous letters exchanged between the parties. This court accordingly was in as good a position as the High Court judge to make findings of facts.

[46] The said property clearly was sold with existing tenancies. Clause 3(c) of the SPA confirms that. To obtain a de-controlled certificate to complete the transaction requires not only Cheang, but also Joseph, as well as the tenants, (inter alia Tan Chin Huat), to take action. It is in evidence that Joseph had, on 5 May 1993, (the same date as signing of the SPA) entered into a written tenancy agreement with Tan Chin Huat granting him a tenancy of three years with effect from 1 July 1993 to 30 June 1996 for the front portion of the ground floor of the said property. Such a conduct clearly had jeopardised the right for Cheang to apply for the said property to be de-controlled. By reason of four other existing monthly tenants, the respondent's solicitors, Chooi, was certainly right when he testified, 'you cannot decontrol a property while having tenants'.

[47] Section 24 of the Act does not apply when there are monthly tenants. This is clear from s 24(1)(a) (See *Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal for Ulu Kinta & Ors* [1972]1 MLJ 70). Section 24(1)(b) is also not applicable because none of the tenants surrendered their tenancies. It is in evidence that when the main tenant vacated the front portion of the said property, Joseph refused to complete the transfer by insisting on vacant possession which is against the SPA.

[48] Was the High Court judge right in rejecting Chooi's evidence when he testified that the inclusion of cl 3(e) was a mistake? When questioned on this issue Chooi testified:

> Usually where there is a condition that the premises to be decontrolled there is usually a clause to state that upon execution of the Sale and Purchase agreement the vendor will proceed to apply for the decontrol. Also following from that there should be a time frame for the decontrol to be obtained. And not open ended as in the present agreement. In the present case the Sale and Purchase agreement and the transfer were executed simultaneously and we proceeded with the adjudication of the transfer. As it has been pointed out just now that the application for decontrol will take a much longer time then the completion date that is 3 months from the date of agreement, we could not have put the completion date at 3 months. The completion date will be after the obtaining of the decontrol. Further the property is sold subject to existing tenancy. This usually leads to complications for obtaining the certificate of decontrol.

[49] The appellants' case was grounded, inter alia, on cl 3(e) being a mistake. The learned judge disbelieved Chooi of having made such a mistake by reason of his failure to immediately inform the parties about the alleged mistake. She held Chooi's failure to do so against the appellants.

[50] On this issue I am of the view that Chooi had no reason to lie about his own mistake. Clause 3(e) clearly contradicted and was inconsistent with cl 3(c). The said property could not clearly in such a situation be decontrolled. I am in agreement with the appellants' counsel submission that Chooi's failure to communicate this mistake to the parties should not have been held against the appellants.

[51] On whether, based on the evidence adduced, the respondent had authorised her son, Jimmy, to act and give instructions to their own solicitors, in view of the respondent's admission that Jimmy had acted with her authority, to give instructions to solicitors on her behalf, the learned trial judge clearly erred in finding that the respondent did not authorise Jimmy to instruct Chooi to terminate the SPA. Jimmy testified that although he had spoken to Chooi on the telephone on prior occasions he denied speaking to Chooi to ask Cheang to terminate the SPA and for the refund of the RM12,500 as stated in Chooi's letter dated 26 June 1998. The trial judge did not believe Jimmy when he

denied telephoning Chooi and asking Chooi to persuade the first appellant to call off the deal and to refund to him the 10% deposit.

[52] On the legal effect of the Repealing Act to the SPA, after careful consideration of the provisions of the Repealing Act, I am in agreement with the appellant's counsel that condition 3(e) of the SPA was no longer capable of performance with the coming into force of the Repealing Act.

[53] Having considered the full factual matrix and the events leading to the termination of the SPA, the documentary evidence and the oral testimony of the witnesses and testing it against the probabilities of the case, it is clear that the SPA had been terminated. That Joseph initially was not right in insisting on a compliance with a condition which was not capable of performance. Cognisance must necessarily be taken of the fact that, despite Joseph having paid the balance purchase price to his solicitors as stakeholder within the three months specified in the SPA, that sum had never been released to Cheang by Joseph's solicitors. With the coming into force of the Repealing Act and condition 3(e) no longer capable of performance, I am of the view that Cheang, had every right to demand release of the balance purchase price to him. When the balance sum was not released to Cheang within the period given, Cheang was entitled and had the right to elect, and had in fact elected, to treat the contract at an end (see *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267). The respondent's unwillingness to authorise her solicitors to release the balance sum to Cheang, contrary to the advise given to her by her own solicitors, clearly disentitled her to specific performance of the SPA.

[54] In the events that had transpired the respondent had clearly not proved fraud beyond reasonable doubt. There clearly was no intention to defraud Joseph's beneficiaries of the said property. When Cheang transferred the property to the second appellant, Cheang had not received the balance purchase price. He had given the respondent due notice to effect payment within the prescribed period after the Repealing Act came into force. Upon termination of the SPA upon instructions by the respondent's son, Jimmy, Cheang was persuaded not to forfeit the deposit. The deposit sum had been duly paid by Cheang to the respondent's lawyers. There was then silence since June 1998. It was only on February 2001 that the respondent claimed to have no knowledge as to what transpired, holding herself out as the only person authorised to give instructions to the lawyers. If indeed this was the position, which I find on the evidence to be unlikely, the respondent was clearly then guilty of delay and laches. Bearing in mind the fact that Cheang only received 10% of the purchase price way back in 1993 which was refunded way back in 1998, the learned judge certainly erred in directing specific performance of the SPA and awarding the respondent damages.

[55] It is evident from the evidence on record, and the grounds of judgment, that the learned judge had not critically analysed the evidence and tested them against the probabilities of the case. The learned judge had failed to judicially appreciate the evidence and made wrong inferences from the proven facts. She erred in taking into account irrelevant considerations and in failing to give due weight to relevant considerations.

[56] The unanimous decision of this court was to allow the appeal and set aside the decision of High Court judge. The respondent was then directed to pay the appellants the sum of RM30,000 as costs here and below. The deposit to appellants.

Appeal allowed.

Reported by Afiq Mohamad Noor